No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

When some but not all defendants settle with a plaintiff in a maritime tort action, should a non-settling defendant who has paid an amount of damages that exceeds its equitable share be permitted to seek contribution from a settling defendant who has paid less than its equitable share?

LIST OF PARTIES

Respondent Florida Power & Light Company's parent company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This case arises out of a maritime accident involving a sailboat owned by Petitioner Boca Grande Club, Inc. ("Boca Grande"). Boca Grande leased its sailboat to two recreational sailors, Robert Polackwich and Jonathan Richards. While Polackwich and Richards were operating the sailboat, its mast came into contact with an overhead power line owned and maintained by Respondent Florida Power & Light Company ("FP&L"). As a result of this contact, both Polackwich and Richards were killed.

The estates of Polackwich and Richards sued FP&L in Florida state court for wrongful death. FP&L in turn brought a third party action in state court against Boca Grande for contribution and indemnity. In response, Boca Grande instituted the instant federal action for limitation of or exoneration from liability. JA 5. In its answer to the federal limitation complaint, FP&L reasserted its claim against Boca Grande for contribution. JA 14-15.

FP&L's contribution claim stated Boca Grande's negligence was "in whole or in part" the cause of the decedent's deaths. FP&L contended Boca Grande neither instructed the decedents regarding the safe operation of the rented sailboat nor determined whether the decedents were qualified to operate it in the first place. In addition, FP&L alleged Boca Grande negligently failed to warn or stop the decedents as they sailed away from the club in the direction of the overhead power line, which Boca Grande knew to be dangerous. Finally, FP&L claimed the sailboat Boca Grande rented the decedents was unseaworthy because it was neither equipped with a mast that would not conduct electricity nor one which

could be easily and rapidly lowered, notwithstanding Boca Grande's knowledge of the dangerous overhead power line. JA 11-15; R4-109-6-11.

Boca Grande eventually settled with the plaintiffs for $225,000.00. JA 37-39; R6-178-13. After settling, Boca Grande took the position that its settlement should act as a bar to FP&L's claim for contribution. It filed a motion for summary judgment in the federal limitation action based on a variation of the so-called "settlement bar rule." JA 51-62. Boca Grande claimed its settlement with the plaintiffs eliminated any possibility that it might have to pay a claim for contribution to FP&L or to any other defendant who would ultimately be required to pay a judgment for more than its equitable or proportionate share of the plaintiff's damages. JA 53-55. Under the version of the settlement bar rule it advocated, Boca Grande took the position that its settlement did not have to be in "good faith," a condition imposed by courts to guard against collusion among the settling parties and unfairness to other joint tortfeasors. JA 55-61.

A. The District Court's Order

The district court adopted the version of the settlement bar rule Boca Grande proposed and granted the motion for summary judgment. JA 88-90. It held Boca Grande's settlement with the decedents constituted an absolute bar to FP&L's action for contribution, and specifically rejected the imposition of any condition that Boca

Grande's settlement with the plaintiffs had to be non-collusive and in good faith. JA 88-90.[1]

B. The Eleventh Circuit's Decision

After summary judgment was entered, the settlement bar rule urged by Boca Grande and applied by the district court was rejected by the Eleventh Circuit in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992). In *Great Lakes*, the Eleventh Circuit held an action for contribution against a settling maritime defendant may be maintained by a non-settling defendant that has paid more than its share of the plaintiff's damages according to the respective degrees of fault. *Id.* at 1582-83. Based on *Great Lakes*, the Eleventh Circuit vacated the instant summary judgment and remanded the case for resolution of FP&L's contribution claim against Boca Grande. *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir.), *cert. granted*, ___ U.S. ___, 114 S.Ct. 39, 125 L.Ed.2d 788 (1993).

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[1] After the wrongful death claims were settled and dismissed from the limitation case, those actions were tried in state court solely against FP&L. They resulted in jury verdicts in favor of the plaintiffs in the total amount of approximately $8.7 million, plus prejudgment interest. The verdict was reduced, however, based on the jury's finding that the decedents were collectively 35% at fault for the collision and FP&L was 65% at fault. (Because this case was tried in state court, these facts are not a part of the instant record and are included by agreement with Boca Grande).

SUMMARY OF ARGUMENT

When a plaintiff in a multi-defendant maritime tort action settles with one defendant, the courts have employed three different methods to account for the settlement in determining the amount of damages that must be paid by the non-settling defendant. Under the approach the Eleventh Circuit followed here, a non-settling defendant who pays damages in excess of its equitable share has a right to seek contribution from a settling defendant who paid less than its fair share. Other courts have corrected the inequity by using the "proportionate credit rule." Under this rule, a non-settling defendant's liability is reduced according to the percentage of damages that equals the settling defendant's proportionate fault. Still other courts, like the district court here, follow the "settlement bar rule." Unlike the first two methods, the settlement bar rule is not designed to eliminate overpayment and insure the non-settling defendant is held responsible only for the portion of the plaintiff's damages it caused. Instead, a non-settling defendant is given a dollar-for-dollar (pro tanto) credit limited to the amount of the settlement, even if the settling defendant has underpaid and the non-settling defendant is left with a bill for damages that far exceeds its true proportionate fault.

Of the three methods, only the contribution and proportionate credit rules are consistent with the controlling principles of maritime law. By holding parties liable for the amount of damages actually attributable to their own conduct, these two rules further the maritime law goals of a more equal distribution of justice and deterrence of negligence. The settlement bar rule, on the other hand, is at odds with these principles. It gives the plaintiff an incentive to settle quickly and cheaply with a less wealthy defendant

irrespective of comparative fault. Such disproportionate settlements are encouraged because the plaintiff knows that even if it settles for too little, it can still go to trial against the deep pocket and recover at least one hundred percent of its damages, even if the remaining defendant is as little as one percent to blame. The result is that the non-settling defendant is forced to bear a disproportionately large amount of the plaintiff's damages, not because of the defendants' relative *culpability* but instead because of the defendants' relative *solvency*.

The one supposed advantage to the settlement bar rule – that it promotes settlements – is an illusion. The rule does promote *partial* settlements. But the plaintiff's knowledge that it need only establish the deep pocket defendant is one percent at fault to recover the entire judgment encourages the plaintiff to go to trail against the remaining defendant. It therefore discourages the sort of comprehensive, full settlements that truly further the goal of judicial economy.

In addition, the partial settlements the settlement bar rule promotes are often unfair. The deep pocket defendant, who was completely shut out of the settlement process, is ultimately forced to overpay when, as the settlement bar rule encourages, the settling defendant pays less than its fair share.

The contribution rule and the proportionate credit rule do not suffer from these defects. They are consistent with maritime law and the policies of equal distribution of justice and safety that underlie it. Either one should be adopted, and the settlement bar rule should be rejected.

ARGUMENT

Boca Grande contends that when a plaintiff in a maritime tort action settles with some but not all defendants, a non-settling defendant that has paid an amount of damages that exceeds its equitable share should not be permitted to seek contribution from a settling defendant who has paid less than its equitable share. Instead, Boca Grande argues, the *best* way to account for a plaintiff's settlement with one defendant prior to judgment is to reduce the judgment in accordance with the settling defendant's proportion of fault. The second best way to resolve the situation, Boca Grande urges, is to bar the non-settling defendant who has overpaid from seeking contribution from the settling defendant who has underpaid.

Of the generally recognized alternatives for handling partial settlements in multi-defendant maritime tort actions, only Boca Grande's first choice, the proportionate credit rule, and the contribution rule the Eleventh Circuit applied below can withstand scrutiny under controlling maritime law and policy. Boca Grande's second choice, the settlement bar rule, conflicts with maritime law and policy and the Supreme Court should discard it.

WHEN SOME BUT NOT ALL DEFENDANTS SETTLE WITH A PLAINTIFF IN A MARITIME TORT ACTION, A NON-SETTLING DEFENDANT WHO HAS PAID AN AMOUNT OF DAMAGES THAT EXCEEDS ITS EQUITABLE SHARE SHOULD BE PERMITTED TO SEEK CONTRIBUTION FROM A SETTLING DEFENDANT WHO HAS PAID LESS THAN ITS EQUITABLE SHARE.

As Boca Grande points out, the authorities discuss three different methods or approaches for dealing with

contribution in the context of partial settlements in multi-defendant maritime tort cases.[2] They are:

(1) The contribution rule, under which the plaintiff's claim against the non-settling defendant is reduced using a "pro tanto" or dollar for dollar setoff and a non-settling defendant that pays more than its apportioned share of liability is allowed to seek contribution from the settling defendant. This is the rule the Eleventh Circuit adopted in *Great Lakes*, 957 F.2d at 1581-83, and followed here. *Boca Grande*, 990 F.2d at 607.

(2) The settlement bar rule, under which the plaintiff's claim against the non-settling defendant is reduced by a pro tanto set off and an action for contribution against the settling defendant is prohibited, usually in conjunction with the requirement that the settlement be in "good faith." Boca Grande urged and the district court adopted this rule, but *without* imposing the usual good faith requirement. The Eleventh Circuit rejected the settlement bar rule in *Great Lakes*.

(3) The proportionate credit rule,[3] under which the plaintiff's claim against the non-settling

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[2] *See Great Lakes*, 957 F.2d at 1581; *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989); Restatement (Second) of Torts § 886A comment m (1977). *See also* L. Kornhauser & R. Revesz, *Settlement Under Joint and Several Liability* (Rev. Draft Nov. 10, 1993) (publication forthcoming).

[3] The Eleventh Circuit refers to this approach as a *"pro rata"* reduction. *Great Lakes*, 957 F.2d at 1581. To avoid confusion with a pro rata credit that has a different meaning, this brief refers to this method as the "proportionate credit" rule.

> defendant is reduced by the amount of the settling defendant's proportionate share of damages. Because the non-settling defendant receives a credit for the portion of the plaintiff's damages caused by the fault of the settling defendant, this method eliminates any reason for the non-settling defendant to sue the settling defendant for contribution. The United States, the Maritime Law Association, and now Boca Grande all support this approach. In *Great Lakes*, the Eleventh Circuit did not disapprove this rule but instead deemed it an unavailable option based on circuit precedent. 957 F.2d at 1580 n.4.

Because there is no action for contribution under either alternative, Boca Grande takes the position that it "would be satisfied" with either the version of the settlement bar rule it supported below or the proportionate credit rule.[4] Pet. Br. at 5. As noted, Boca Grande's first choice is the latter, which it describes as "preferable," "more efficient," and "more workable." Pet. Br. at 5, 7, 17.

That Boca Grande supports any rule that will conclude its involvement in this matter based on the relatively small amount it paid in settlement is understandable. But the rule this Court adopts should comport

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[4] Boca Grande labels both approaches "settlement bar rules." This is somewhat inaccurate. The method Boca Grande urged below is a true settlement bar rule because it "bars" a non-settling defendant from seeking contribution. The proportionate credit rule, on the other hand, does not actually bar contribution, but instead eliminates the necessity for it by giving non-settling defendants a credit for the portion of the plaintiff's damages caused by the settling defendants.

with settled principles and policies of maritime law. Because it conflicts with those principles, Boca Grande's second choice – the settlement bar rule – should be rejected. The Supreme Court should either affirm the Eleventh Circuit and permit contribution or adopt the proportionate credit rule.

A. The settlement bar rule is inconsistent with federal maritime law and the policies underlying it.

Conceding it is less "workable" and "efficient" than the proportionate credit rule, and that it "does run afoul of" *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), Boca Grande nevertheless maintains its second choice, the settlement bar rule, should be adopted over the Eleventh Circuit's contribution rule. Pet. Br. at 7, 20. For at least two reasons, Boca Grande is wrong and the settlement bar rule should be rejected.

1. The settlement bar rule conflicts with the principles of more equal distribution of justice and safety.

Equal and just allocation of liability and encouragement of safety and deterrence of negligence are cornerstone principles of maritime law. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974), the Supreme Court reaffirmed the "well-established maritime rule allowing contribution between joint tortfeasors" and rejected the common law rule of no contribution. In reaching this conclusion, *Cooper Stevedoring* identified the core principles underlying maritime contribution as (1) a

more equal distribution of justice and (2) safety or deterrence. 417 U.S. at 111.[5] One year later, in *Reliable Transfer*, the Supreme Court focused again on the principle of a more equal distribution of justice and rejected the old "palpably unfair" rule of equally divided damages in favor of apportionment of damages according to comparative degrees of causative fault. 421 U.S. at 405, 408.[6]

Unlike the Eleventh Circuit's contribution rule, the settlement bar rule Boca Grande supports cannot be squared with *Cooper Stevedoring* and *Reliable Transfer*. Permitting contribution insures liability will be shared by all joint tortfeasors in proportion to their respective degrees of fault. *Great Lakes*, 957 F.2d at 1581. The settlement bar

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[5] The Supreme Court stated:

> Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. . . . Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." And a "more equal distribution of justice" can best be achieved by ameliorating the common law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 110-11 (citations omitted).

[6] *Reliable Transfer* emphasized the goal of "just and equitable" allocation of damages, and stated "that goal can be more nearly realized by a standard that allocates damages according to comparative fault whenever possible." 421 U.S. at 411.

rule, however, violates the principles of "more equal distribution of justice" and "just and equitable" allocation of damages. As the Eleventh Circuit observed in *Great Lakes*, the settlement bar rule makes it possible for a non-settling defendant to be forced to bear a disproportionately greater amount of the plaintiff's damages, far in excess of culpability, merely because the plaintiff decides to settle with a different defendant for less than its fair share. 957 F.2d at 1582.[7]

The settlement bar rule also conflicts with the maritime law goal of encouraging safety and deterring negligence. Contribution guarantees an efficient level of deterrence against future negligence because each party is required to bear that portion of the damages caused by its own negligence. *Great Lakes*, 957 F.2d at 1582; *see also Reliable Transfer*, 421 U.S. at 405 n.11 (comparative fault "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others"). By contrast, under the settlement bar rule, a maritime defendant can avoid the true measure of its liability by making a quick and cheap settlement, which negates the deterrent effect of comparative fault.

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[7] Although the United States and the Maritime Law Association favor the proportionate credit approach, they agree that between the remaining options – contribution and settlement bar – the former is preferred and the latter should be rejected as unfair and contrary to the Supreme Court precedent.

2. The settlement bar rule does not encourage full, efficient, and fair settlements.

Boca Grande does not seriously dispute that at least as compared to the Eleventh Circuit's contribution rule, the settlement bar rule does not promote either the principle of a more equal distribution of justice or the principle of safety and deterrence. Instead, Boca Grande's only real criticism of the contribution rule and the only advantage it claims for the settlement bar rule involves settlement. The settlement bar rule better promotes settlement, Boca Grande's argument runs, because a defendant will not settle unless it knows it will be free of contribution claims by non-settling defendants.

Boca Grande's analysis is short-sighted and inaccurate. The settlement bar rule does not create an incentive for comprehensive settlements that quickly and efficiently put an end to litigation. Instead, it works at cross purposes to this goal by encouraging only partial settlements with the result that litigation continues but on a fragmented and piecemeal basis. The problem is exacerbated because the settlement bar rule promotes unfairness and collusion in the partial settlements it encourages.

a. The settlement bar rule does not encourage full and efficient settlements.

Contrary to Boca Grande's claim, the settlement bar rule promotes quick but only partial and often unjust settlements, ultimately *delaying* resolution of the entire case. Under the settlement bar rule, the plaintiff has the

power to target a deep pocket while insulating the settling defendant from contribution, even though the settling defendant may be far more culpable. When a plaintiff settles with a defendant, there will often be little or no incentive for the plaintiff to settle with the remaining one. The plaintiff knows it need only establish one percent of fault on the part of the remaining defendant to recover the entire judgment. *See Great Lakes*, 957 F.2d at 1582. For this reason, the settlement bar rule actually diminishes the possibility of a reasonable global settlement and encourages a trial. Thus, while the settlement bar rule encourages *partial* settlements, it may also have the ultimate effect of prolonging, not shortening, litigation. *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1576 (D.S.C. 1991).

Boca Grande's relative culpability is not yet known.[8] The five year history of the instant litigation strongly suggests, however, that application of the settlement bar rule has guided this case into the above counterproductive pattern. Three years ago, the plaintiffs agreed to settle with Boca Grande for $225,000. With this $225,000 war chest, the plaintiffs went to trial solely against FP&L, safe in the knowledge that they needed only to establish one percent of fault on FP&L's part to recover the entire

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[8] Boca Grande's fault was not determined in the federal limitation action because the district court applied the settlement bar rule. It was not determined in the state trial either, because over FP&L's objection, the trial judge refused to follow the proportionate credit rule. (The latter fact is not a part of the instant record and is included by agreement with Boca Grande).

judgment. After a lengthy state trial, the plaintiffs eventually won an $8.7 million gross verdict. Boca Grande's settlement is only 2½% of this amount.

The point is that the settlement bar rule is inefficient because it disrupts the normal balance of settlement risks. In this case, there is a strong suggestion that Boca Grande's early and relatively cheap settlement made it less likely, not more likely, that this *entire* case would be resolved short of the full trial and the pending federal and state appeals that have followed. The result is that FP&L, the one party who had no involvement in the settlement decision in the first place, has been saddled with the risk that the plaintiffs settled with Boca Grande for far too little. *See Great Lakes*, 957 F.2d at 1582. Contrary to the advantage of efficiency Boca Grande claims, application of the settlement bar rule in the instant case evidently did nothing to encourage a meaningful settlement that would promote true judicial economy.[9]

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[9] Against this background, the efficiency gain Boca Grande claims if the settlement bar rule is applied *without* a good faith condition, Pet. Br. at 21-23, is at the most *de minimus*. Further, not even one of the cases Boca Grande cites to criticize the good faith requirement actually advocates or employs a settlement bar rule without it. Even The National Association of Securities and Commercial Law Attorneys ("NASCAT"), a staunch proponent of the settlement bar rule, concedes the rule cannot be applied without a good faith condition, and the sort of good faith hearing both Boca Grande's authorities and NASCAT concede would be needed to assure fairness bears a striking resemblance to a full trial on the merits, or at least a "not-so-mini-trial." Pet. Br. at 21-23; NASCAT Br. at 12-13, 26 n.24.

In any event, it is by no means certain that the contribution rule will frustrate settlements. As the Eleventh Circuit observed, "the deterrent effect on settlements [if contribution is allowed] . . . is far from clearly established," particularly when contribution is compared with application of a settlement bar rule with a "conscientiously enforced" good-faith requirement. *Great Lakes*, 957 F.2d at 1582.

b. The settlement bar rule encourages unfair settlements.

Not only is the settlement bar rule inefficient in the long run, it is also unfair. As noted, the rule encourages the plaintiff to settle with the less affluent defendant and then combine with it to take advantage of the deep pocket defendant. The deep pocket defendant, who was excluded from the settlement process, will ultimately be forced to foot a disproportionate share of the bill if the partial settlement was for less than the settling defendant's proportionate share.

For this reason, even if contribution might deter the partial settlements the settlement bar rule promotes, the settlement bar rule should still be rejected. To the extent there is a tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail. The Supreme Court said as much in *Reliable Transfer*, when it abandoned the old rule of divided damages over the protest that comparative fault would discourage settlements. Declining to elevate bare efficiency above fairness, the Court refused to "continue the operation of an archaic rule because its facile application out of

court yields quick, though inequitable, settlements, and relieves the courts of some litigation." 421 U.S. at 408.[10] Instead, *Reliable Transfer* explained that "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Id.*

Simply put, it is inherently unfair that the liability of a party such as FP&L should derive not from its own responsibility for the accident but rather from a private contractual arrangement made by others in which FP&L was not permitted to participate. The exposure of non-settling defendants to liability which exceeds their proportionate fault is an unfair allocation of risks and runs afoul of the principle of a more equal distribution of justice in *Cooper Stevedoring* and *Reliable Transfer*. It is also at odds with the goal of safety, because deterrence is not encouraged when a party knows its ultimate liability hinges not on its comparative culpability but instead on its comparative solvency, a factor over which it has no control.

The settlement bar rule conflicts with the core principles of just allocation of damages and safety. It promotes only partial settlements and does not enhance judicial economy or reduce the ultimate cost and complexity of multi-defendant maritime tort actions. As between the settlement bar rule and the contribution rule, the

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[10] *See also Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985) (recognizing the settlement bar rule may "encourage settlement all right, but it would be contrary to the spirit of contribution since it would allow guiltier defendants to get off cheaply by settling first").

Supreme Court should reject the former, adopt the latter, and affirm the Eleventh Circuit.

B. Like the contribution rule, the proportionate credit rule is consistent with maritime law and policy.

Should the Supreme Court decline to adopt the Eleventh Circuit's contribution rule, it should opt for the proportionate credit rule, the method Boca Grande actually prefers.[11] This alternative is also the first choice of the United States and the Maritime Law Association as amici curiae. Under the proportionate credit rule, the fact finder determines the proportionate fault of the defendants who have settled and an amount reflecting the settling defendants' proportionate share of liability is deducted from the judgment against the remaining defendants. *See, e.g., Associated Electric Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1991); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Like the Eleventh Circuit's contribution rule, the proportionate credit rule is consistent with federal maritime

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[11] In its amicus brief, NASCAT suggests that because Boca Grande and FP&L agree the proportionate credit rule is a viable alternative, this case may fail to pose an actual case or controversy. NASCAT Br. at 16 n.10. NASCAT is wrong. While Boca Grande and FP&L agree conceptually on the advantages of the proportionate credit option, they are diametrically opposed with respect to the merits of the other two alternatives, contribution and settlement bar. As the parties do not desire "precisely the same result," Article III's case or controversy requirement is satisfied. *See GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 383 (1980).

principles and policies. Both rules further the goal of a more equal distribution of justice by apportioning the liability of multiple wrongdoers according to comparative degrees of fault in keeping with *Reliable Transfer*, 421 U.S. at 411. In this regard, both rules prevent a non-settling defendant from paying more than its proportionate share of a plaintiff's damages. The contribution rule achieves this result by allowing defendants to divide up the bill on the basis of proportional fault after the plaintiff has been compensated. The proportionate credit method accomplishes the same thing by allowing the plaintiff to recover an amount reflecting the proportional fault of the non-settling defendant, no more and no less.

Likewise, both approaches encourage safety and deter negligence. Under both the Eleventh Circuit's contribution rule and the proportionate credit rule, deterrence is promoted because liability is focused on the party most responsible for the harm. *See, e.g., Reliable Transfer*, 421 U.S. at 405 n.11; *Cooper Stevedoring*, 417 U.S. at 110-11.

In addition to consistency with the controlling legal principles, the proportionate credit approach offers other advantages over the settlement bar rule. It is a fair method because it assures the parties to the settlement will receive the benefit of their bargain while at the same time each non-settling defendant is held responsible for the share of the plaintiff's damages it actually caused. More culpable defendants bear greater liability and less blameworthy ones bear less, without regard to the settling parties' bargains.

This fairness yields efficiency. As each defendant is responsible for only its proportionate share, non-settling defendants have no reason or need to seek contribution from settling defendants. For the same reason, non-settling defendants have no reason or need to question the good faith or reasonableness of the settlement between the plaintiff and other defendants in a good faith proceeding. As a result, the entire case is resolved in a single trial.

The proportionate credit approach offers the additional advantage that it will promote settlements on terms that are reasonable and fair to all concerned, plaintiffs and defendants alike.[12] As noted, under the settlement bar rule, a plaintiff is encouraged to enter into a partial settlement with a highly culpable but less wealthy defendant for an amount far less than the defendant's proportion of fault. The plaintiff will do so because it knows it will recover one hundred percent of its damages so long as it proves the deep pocket defendant is at least one percent to blame. The non-settling defendant, who has no involvement in the settlement, is forced to bear the brunt of the plaintiff's strategy by paying the difference between the settling defendant's true fault and its bargain.

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[12] Significantly, the Maritime Law Association, which has a membership that includes federal judges, law professors, and 3,600 attorneys who represent *both* maritime plaintiffs and defendants, favors the proportionate credit rule. MLA Br. at 1-2. NASCAT, an organization of attorneys that "frequently represent plaintiffs in such actions," NASCAT Br. at 1, opposes it and uses its amicus brief to support the settlement bar rule.

Under the proportionate credit rule, this scenario is eliminated. The plaintiff can no longer force a less culpable but deeper pocket defendant to bear a disproportionate burden that is based not on comparative fault but on comparative solvency. A non-settling defendant cannot be held responsible for any more or any less than the share of the plaintiff's damages it caused. The plaintiff is encouraged to settle on reasonable and fair terms, knowing it will gain nothing by a collusive or irresponsibly low settlement.

In the belief the proportionate credit rule will be harmful to the securities plaintiffs its members represent, NASCAT contends this method (1) will complicate litigation by requiring the trier of fact to make decisions regarding the liability of persons who are no longer parties to the litigation and (2) possibly reduce a plaintiff's total damage recovery. NASCAT Br. at 21-29. Neither criticism is accurate or sound.

First, with respect to NASCAT's "empty chair" argument, litigants have always had to deal with the fault of settling defendants and it is often argued that some party not present was the real cause of the accident. Permitting the finder of fact to determine the proportionate culpability of all defendants at the same time should not present additional difficulty. Under the proportionate credit rule, the conduct of all actors is put before the finder of fact, and the fault of an absent party whose conduct has been proven at trial will be determined based on the evidence. Further, since the plaintiff has settled with the absent party, it should have no difficulty in arranging with the settling defendant to make key

witnesses available as part of the bargain, should this be necessary.

In any event, assuming for the sake of argument that deciding all issues of fault and liability in a single trial is somehow more complicated than the piecemeal proceedings the settlement bar rule promotes, this Court's precedents support the fairer approach. "Potential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." *Reliable Transfer*, 421 U.S. at 407.

Second, NASCAT's assertion that a plaintiff might receive less under a proportionate credit rule than what it might otherwise receive under the settlement bar rule tells only part of the story. It is true that a plaintiff might recover less from a settling defendant than the defendant's share of damages is ultimately determined to be, although NASCAT's own brief suggests such instances should be rare, as "simple economic self interest should insure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant." NASCAT Br. at 12. It is also true, however, that a plaintiff may reach a favorable settlement that exceeds the finder of fact's eventual decision as to the settling party's proportionate fault.[13] Certainly NASCAT does not contend that a plaintiff should not be permitted to keep

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[13] Indeed, in *Leger*, a leading proportionate credit rule decision, this is precisely what happened. The settling defendant paid more than its proportionate share of damages and, as a result, the plaintiff's compensation exceeded his actual damages as determined by the jury. 592 F.2d at 1250.

the benefit of its bargain in the event it settles on favorable terms and is disproportionately or doubly rewarded. It therefore should not be heard to complain that a "shortfall" from a bad settlement violates some abstract notion of what constitutes "full" compensation.

In every settlement there is the risk that a defendant might pay too much or the plaintiff may accept too little. This reality does not undermine the settlement process or destroy its viability. To the contrary, acceptance of a known, certain recovery or liability at the expense of an uncertain, but possibly greater recovery or liability at trial is the precise reason for settling.[14]

NASCAT's desire to have it both ways illuminates a fatal flaw in the premise that underlies its position. The so-called "right to be made whole" NASCAT articulates rests on the erroneous assumption that settlement dollars, obtained at a time of uncertainty, can be equated to damages recovered after a trial. But dollars paid in settlement to avoid litigation risks and expenses cannot be

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[14] NASCAT's stock refrain that as between plaintiffs and defendants, the tortfeasor and not the "innocent victim" should bear any inequity, NASCAT Br. at 5, is particularly inapt here. The jury determined the instant decedents were 35% at fault for their own deaths. Because the federal and state trial courts denied contribution and proportionate fault allocation, the comparative culpability of Boca Grande and other possible defendants has not been determined. It is at least possible, however, that other defendants are substantially at fault and that FP&L's true share of culpability is *less* than the 35% blame the decedents bear. If this is the case, it is manifestly unjust to saddle FP&L with 62½% of the damages when it is in reality less at fault than the "innocent victims."

equated with post-trial dollars paid in satisfaction of a judgment. *See Leger*, 592 F.2d at 1249-50 n.10.

Finally, NASCAT is wrong in its contention that the proportionate credit approach is inconsistent with *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Unlike the instant situation, which is governed by general maritime tort law, *Edmonds* involves the specific statutory regime of immunities and liabilities under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* It did not touch on settlement issues and for this reason, the language relied on by NASCAT is dicta. *Edmonds* focused on a defendant's avoidance of tort liability by payment of statutorily required benefits, not the public policy considerations presented in cases involving the instant fact pattern, "such as the need to deter collusive settlements without deterring legitimate ones." *Associated Electric*, 931 F.2d at 1270-71.

It is true the *Edmonds* Court recognized its holding would result in inequity, but the inequity was justified based on the "delicate balance" in that case between shipowners, stevedoring companies, and longshoreman, which the court did not want to "knock out of kilter." 443 U.S. at 275. No such "delicate balance" is presented here and, in any event, settling defendants like Boca Grande do not typically enjoy the statutory immunities that were critical to the *Edmonds* decision. Adoption of the proportionate credit rule does not conflict with *Edmonds*.

In sum, both the contribution rule and the proportionate credit rule are consistent with maritime law and policy. The Supreme Court should adopt either one of

these approaches and reject the settlement bar rule, which is inefficient, unfair, and in conflict with the principles articulated by the Supreme Court in the controlling maritime cases.

CONCLUSION

The Supreme Court should either affirm the decision of the Court of Appeals for the Eleventh Circuit and adopt the contribution rule or, in the alternative, reverse and adopt the proportionate credit rule.

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